No. 153117

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

TODD RANDOLPH VAN DOORNE,

Defendant-Appellant.

ON APPEAL FROM THE KENT COUNTY CIRCUIT COURT

Court of Appeals Case No. 323643

Kent County Circuit Court Case No. 14-003215-FH

SUPPLEMENTAL BRIEF OF APPELLANT TODD VAN DOORNE

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This is a supplemental brief, pursuant to the Michigan Supreme Court's Order issued in response to Defendant-Appellant's interlocutory Application for Leave to Appeal an Opinion of the Michigan Court of Appeals affirming the trial court's denial of Appellant's Motion to Suppress Evidence.

On August 26, 2014, the trial court issued an Opinion and Order denying the Appellant's Motion to Suppress. On October 15, 2014, the Michigan Court of Appeals denied leave to appeal. On December 2, 2014, Appellant filed his application for leave to this Court. On April 10, 2015, this Court, in lieu of granting leave, remanded this case to the Court of Appeals with instructions to consider whether the knock and talk procedure conducted in the instant case was consistent with the Fourth Amendment as articulated in *Florida v Jardines*. In a split decision, issued on December 8, 2015 and released for publication, the Michigan Court of Appeals affirmed the trial court's decision.

On February 2, 2016, Defendant-Appellant timely filed an Application for Leave to Appeal, requesting that this Court grant leave based on MCR 7.305(B)(2), (3), and (5). On June 10, 2016, this Court entered an order directing the parties to file supplemental briefs addressing three issues: (1) whether the knock-and-talk procedures employed by the law enforcement officers violated the general public's implied license to approach the defendants' residences and constituted unconstitutional searches in violation of the Fourth Amendment; (2) whether the conduct of the law enforcement officers "objectively reveals a purpose to conduct a search" to obtain evidence without the necessity of obtaining a warrant; and (3) whether the conduct of the law enforcement officers was coercive.

STATEMENT OF QUESTIONS PRESENTED

I. In *Florida v Jardines*, 569 US ___, 133 S Ct 1409 (2013), the United States Supreme Court held that police officers conducting a "knock and talk" are limited to actions that a reasonable visitor could be expected to take in attempting to make contact with the residents. Here, seven law enforcement officers approached Van Doorne's home in the pre-dawn hours and knocked for two to four minutes. Did the knock and talk exceed the scope of Van Doorne's implied license and demonstrate an objective intent to search and thus violate the Fourth Amendment?

Appellant's Answer:	Yes
Appellee's Answer:	No
Court of Appeals Answer:	Did not address.

II. In *United States v Spotted Elk*, 548 F3d 641 (CA 8, 2008), the Eight Circuit Court of Appeals held that certain knock and talks can implicate coercive tactics and render consent involuntary. Here, two superior law enforcement officers pounded loudly on Van Doorne's door for two to four minutes, woke the occupants of the home, and insisted on speaking with him. Was Van Doorne's consent invalid because the manner of the unreasonable knock and talk coerced him into allowing a warrantless search of his home?

Appellant's Answer:	Yes
Appellee's Answer:	No
Court of Appeals Answer:	Did not address.

INTRODUCTION

Imagine that you, your spouse, and children are fast asleep, in bed, in the safety and tranquility of your home. You are safe in your castle. It is dark outside. Suddenly, your spouse is shaking you, trying to roust you awake, telling you something is wrong. The fear and concern in their eyes is palpable. You fear for the safety of your family. Loud pounding noises emanate from the downstairs door, the doorbell rings incessantly. Your dog begins barking, and while barely awake, you try to make sense of the chaos.

Glancing over at the clock, you see it's 5:30 a.m. and you consider grabbing a gun for protection. After fumbling around for a robe, you make your way downstairs to find a group of people parked in your driveway with the headlights from their cars shining inside your home. When you finally open the door, there are seven salesmen standing there asking if you are interested in purchasing a vacuum cleaner.

The State asks this Court to authorize this type of early-morning "knock and talk." More specifically, the State asks this Court to ignore United States Supreme Court precedent and caselaw nationwide holding that knock and talks must be performed within the confines of a homeowner's implied license extended to uninvited visitors. In the present case, seven members of the Kent Area Narcotics Enforcement Team descended on a home in the dark, pre-dawn hours of March 18, 2014. Upon arrival, they pounded loudly on the door, and rang the doorbell for two to four minutes. The now-awakened, half-asleep occupants were interrogated and the home searched, in what can only be categorized as a patently unreasonable search in violation of the Fourth Amendment. The police actions in this case were calculated and intentional.

The lower courts misunderstood and misinterpreted the law. The United States Supreme Court's decision in *Florida v Jardines* restricts knock and talks to the scope of a homeowner's implied license. Law enforcement knock and talks are restricted to the actions that a reasonable

visitor could be expected to take. That is not what happened here. Instead, law enforcement violated Mr. Van Doorne's implied license by arriving at an unreasonable time and showing an objective intent to conduct a warrantless search. By using these coercive and unjustifiable tactics, KANET vitiated any consent that Van Doorne provided.

Both lower courts erred by denying Mr. Van Doorne's Motion to Suppress, and this Court should overturn their decisions. Mr. Van Doorne's Fourth Amendment right against unreasonable searches was violated, and as such, the evidence obtained must be suppressed.

STATEMENT OF FACTS

On March 17, 2014 at 10:15 p.m., six officers of the Kent Area Narcotics Enforcement Team ("KANET") executed a search warrant at a home in Belmont, Michigan. (Tr. 6/30/14, 26: 16-20; 102:3-10). The home belonged to Timothy Scherzer. (*Id.* at 43:8-11). Mr. Scherzer was a registered primary caregiver under the Michigan Medical Marihuana Act for five registered qualifying patients. Scherzer told the KANET officers that he had supplied marijuana butter to his patients, four of whom were employees of the corrections division of the Kent County Sheriff Department ("KCSD"). (*Id.* at 26:21-27:6). Defendant-Appellant Todd Randolph Van Doorne ("Van Doorne") was one of the KCSD jail deputies. His name only came to light when his medical marijuana card was discovered during the execution of the search warrant at Scherzer's home. (*Id.* at 114:2-21).

Decision to perform a knock and talk rather than seeking a search warrant

Upon learning that there were KCSD jail deputies who were medical marijuana patients that had been supplied with marijuana butter, KANET contacted Lieutenant Al Roetman, a higher ranking KCSD officer, for advice on how to proceed. (*Id.* at 102:6-10). After a meeting between Sergeant Nicklous Kaechele and Lt. Roetman, and a phone call with Captain Kelley, a decision was made to perform late-night "knock and talks" at each KCSD employees' home instead of seeking search warrants. (*Id.* at 99:21 – 100:25; 121:25 – 122:9; 122:19 – 123:15). Lt. Roetman testified that his conversation with KCSD Captain Kelley was informational, but Lt. Roetman did not consult with Captain Kelley regarding KANET's choice to perform knock and talks in lieu of obtaining warrants. (*Id.* at 122:19-123:15). Lt. Roetman testified, "[t]he case we were investigating referenced to a medical marijuana case that started out on Van Dam in Plainfield Township, which

resulted in some information that employees from the sheriff's department were in possession of medical marijuana butter or marijuana butter. (*Id.* at 114:16-21).

Deputy Todd Butler testified that before KANET elected to perform the knock and talks, there was a brief discussion between the team members about obtaining search warrants. Deputy Butler testified that, "we didn't do it [obtain search warrants], because it was getting late, and it's quicker just to go and ask for consent." (*Id.* at 65:9-15). Deputy Butler further testified that the factors weighing against obtaining a search warrant included the amount of time it would take, the fact KANET would have needed to wake up a judge or magistrate, and that "[e]ighty percent of people cooperate." (*Id.* at 67:15).

Michael Frederick, Van Doorne's co-defendant, testified that Lt. Roetman told him that the KANET officers chose not to obtain search warrants because the KCSD wanted to avoid a public record of the situation because of the media attention. (Tr. 7/14/14, 17:19-25). Lt. Roetman confirmed that had they obtained search warrants, it would be in the record and the "media would get ahold of it right away." (Tr. 7/2/14, 24:6-9). Lt. Roetman classified KANET actions as a "less intrusive" method as opposed to obtaining a warrant. (*Id.* at 35:14). Lt. Roetman continued that if a warrant had been obtained, the entry into Van Doorne's home could have been very different, including breaking down doors and entering with guns drawn. (*Id.* at 36:12-19). Detective Christine Merryweather echoed Lt. Roetman's sentiment, that a warrant is more intrusive because the team would enter with guns drawn and all people over the age of sixteen would be handcuffed. (*Id.* at 68:18-69:6).

Deputy John Tuinhoff testified that he has done approximately twenty knock and talks, with about ten of them performed after 1 a.m., although he had also "been a part of more than that

they [sic] haven't been my initial investigation" (Tr. 6/30/14, 33:3-8). He described the circumstances for such an event:

> [I]f we were investigating a case and it leads on to another house that we don't have enough for a search warrant, we've – when I was at the metropolitan enforcement team [another vice unit in Kent County] and also KANET I did that several times.
> **Q**. So you go in the middle of the night?
> **A**. If we execute a search warrant in the day and the investigation leads us on, typically, we'll just keep going with it, because if we didn't make contact at 1 in the morning, there's a good chance with the phone tree that someone might find out we were at another house. We might potentially lose evidence, so yes. Typically, we start from "A" in an investigation and go all the way through.
> **Q**. How many have you done at 2 a.m.?
> **A**. I don't recall, but I guess what I can say to you is I've done several in the middle of the night.

(*Id.* at 33:17-34:6).

Deputy Butler testified that during his time with KANET, the number of knock and talks he has been involved with "[b]allpark would be hundreds" (*Id.* at 58:16). When asked how many had been done at 1 a.m., Deputy Butler testified, "[i]t all depends, I can't tell you exactly, but if you started an investigation at 9 or 10 o'clock at night and it continues – I know for a fact I've done them at midnight or later." (*Id.* at 58:22-25). When asked, "[b]allpark, how many of the hundreds?" his response was, "[t]en percent, and that's a guess" (*Id.* at 59:1-2). Sgt. Kaechle testified that knock and talks do not generally occur after midnight because the team's hours are scheduled from 1 p.m. to 11 p.m., "unless of course we're on an investigation that brings us into the night like this one did." (*Id.* at 108:2-5). Lt. Roetman indicated that knock and talks are "frequently" performed "in lieu of getting a search warrant." (*Id.* at 123:20-23). Of those "frequent" knock and talks, Lt. Roetman initially indicated that "probably" fifty percent of knock and talks are performed after midnight, then changed his position to "twenty-five or thirty percent," before finally concluding that, "you're asking for a percentage. I can't tell you." (*Id.* at 124:4-8). Lt. Roetman testified:

> Just because it hits the stroke of midnight doesn't mean our case stops and we don't keep going to people's homes, whether it's a marijuana case or an armed robbery. If it's an armed robbery we're investigating and we have additional leads from one location to another, we continue that investigation until it stops, whether it takes 24 hours or 6 hours or 4 days. I don't know what you're getting at.
>
> (Tr. 7/2/14 Tr, 16:24-17:6).

Multiple members of KANET testified that it would be unreasonable for a salesman, a Girl Scout selling cookies, or a traveling evangelist to knock or ring their doorbell at 4:00 a.m. or 5:30 a.m. in the morning. (Tr. 6/30/14, 90:15-9:3; Tr. 7/2/14, 21:16-17).

Knock and talk performed at Van Doorne's home

Seven members strong, KANET arrived at Van Doorne's home in four unmarked KCSD vehicles in the predawn hours of March 18, 2014. (Tr. 6/30/14, 25:18-25; 39:24-40:6). KANET arrived at Van Doorne's home at 5:30 a.m. (*Id.* at 10:2-7).

Deputy Tuinhoff testified that four officers were at Van Doorne's door when KANET knocked. (*Id.* at 12:20-23). The officers who approached Van Doorne's door were Lt. Roetman, Sgt. Kaechele, Deputy Tuinhoff, and Deputy Butler. (Id. at 11:20-22). Based on the testimony of Deputy Butler, the three officers who did not physically approach the door were standing in Van Doorne's driveway. (*Id.* at 53:2-11). Deputy Butler testified that group of officers at the door initially knocked on one of Van Doorne's front doors, but because of the layout of the house, Van Doorne came to a different door. (*Id.* at 62:2-6). Deputy Butler was unsure how long KANET actually knocked on Van Doorne's door but estimated it was two to three minutes. (*Id.* at 62:7-8). However, Lt. Roetman conceded that KANET knocked on Van Doorne's door "a little longer [than the other homes]" because of the layout of the house. (Tr. 7/2/14, 15:22-16:2). Van Doorne estimated that KANET knocked on his door for two to four minutes. (Tr. 7/2/14, 105:2-3).

Lt. Roetman agreed that everyone in Van Doorne's home appeared to be asleep at 5:30 a.m., there were no lights visible inside, nor was anyone moving inside the home. (Tr. 7/2/14, 15:9-17). Van Doorne testified his entire family had the flu and were battling its symptoms. (*Id.* at 102:20-103:4). Van Doorne made several attempts to call in sick during the night and finally reached someone at the Kent County Jail around 4:00 a.m. The entire Van Doorne family was sound asleep at 5:30 a.m. (Tr. 7/14/15, 17:4-9). Lt. Roetman asserted that Van Doorne should have normally been awake for work by 5:30 a.m. based on the time he needed to be at work and how long it would take him to get to work. (Tr. 7/2/14, 20:22-24; 34:3-8). However, Lt. Roetman admitted that he was aware Van Doorne had called in sick for work that day. (*Id.* at 16:5-8). Van Doorne's dog began barking when the knocking started and the barking may have been what actually woke Van Doorne and his family. (*Id.* at 28:6-7).

Van Doorne described KANET's knock and talk as a "pound and talk." (*Id.* at 107:6-11). Van Doorne describes the initial contact:

> Beginning with the thumping on the door, the pounding on the door, the doorbell, the dog barking, my wife jumping up and saying "Todd, Todd, something is up," and pounding on the door, the dog freaking out, the doorbell ringing, the pounding, the doorbell – was fear, chaos, concern. I didn't know what was happening.
>
> (*Id.* at 104:2-9).

Van Doorne testified that the barrage of noise continued: "bing, bing, bing on the doorbell, then pound, pound, pound, and the cycle repeated and repeated and repeated." (*Id.* at 104:23-105:1) Van Doorne considered grabbing the shotgun next to his bed. (*Id.* at 105:5-8). When able to look outside, he observed multiple cars lining his driveway, their lights shining on the home, and multiple officers in tactical gear. (*Id.* at 105:10-15). Van Doorne recognized Lt. Roetman as soon as Van Doorne opened the door. (*Id.* at 105:17-19).

When Van Doorne opened the basement door and asked Lt. Roetman what was going on, Lt. Roetman responded: "we're here about the butter." (*Id.* at 106:12-23). Van Doorne recognized that Lt. Roetman was a superior officer. (*Id.* at 109:11-19). Van Doorne testified that he didn't believe he could say no to KANET's request to search his home:

> **Q:** Well, at some point, were you asked to sign a document?
> **A:** Yes.
> **Q:** Can you tell us what it was?
> **A:** I believe consent to search.
> **Q:** Why did you sign it?
> **A:** They asked me to. Part of the investigation – I can't say no to a department investigation. I have to comply. I have to cooperate. I can't lie, or you lose your job. It's engrained in you from day one that you can screw up at the department, but don't lie. If you lie about it, you screw up, you will get fired. There's no option; you don't lie and you comply.
>
> (*Id.* at 113:5-14).

Van Doorne testified that he "was a little confused, disoriented, still in shock from them being there. (Tr. 7/14/14, 18:17-22). Van Doorne was unclear what type of investigation this was, criminal or internal with the KCSD, "I didn't know what exactly was going on at the time. It was very hard for me to cope with all the things that were happening. I was more worried about what was going on inside with my family. My job is on the line. I'm thinking I'm losing everything. I was confused and panic [sic]." (Tr. 7/2/14, 112:2-10). Van Doorne testified that Lt. Roetman told him that "[t]hey called the sheriff, and the sheriff said come out here without a warrant, don't want a public record of this yet and to talk to us in this fashion." (*Id.* at 111:12-19). Lt. Roetman and other KANET members deny mentioning the sheriff early in the conversation, but admit he may have been mentioned later on. (Tr. 6/30/14, 29, 45, 55, 65, 91, 121-122; Tr. 7/2/14, 13, 35, 37, 74-75).

Sgt. Kaechle testified that Van Doorne appeared lucid and understanding of the questions he was being asked; he was "fine. He was alert. He was, you know, talking clearly." (Tr. 6/30/14,

12, 84). Van Doorne did not appear to be under the influence of any medication, prescription or otherwise. (*Id.* at 85, 119). Van Doorne was read his *Miranda* rights and appeared to understand questions asked of him and responded in a way that demonstrated comprehension. (*Id.* at 15, 54, 55). Van Doorne eventually consented to the search of his home and signed a document to that effect. (*Id.* at 16-17, 54-55).

The subsequent search yielded marihuana butter and brownies Van Doorne was using for his medical condition pursuant to his MMMA card. Van Doorne was charged with Possession of Marijuana in violation of MCL 333.7403(2)(d) and with Maintaining a Drug House in violation of MCL 333.7405(1)(d).

Trial Court findings on the Motion to Suppress

On August 26, 2014, the trial court issued an opinion and order in Van Doorne's case. The trial court determined that KANET had not conducted a search or seizure prior to receiving consent to search, and the Supreme Court's ruling in *Florida v Jardines* was not controlling based on its facts. The trial court ruled that Van Doorne had voluntarily consented to the KANET search and, therefore, suppression of the evidence was not appropriate.

Further facts will be developed as necessary in the arguments below.

STANDARD OF REVIEW

This Court reviews a trial court's findings of fact at a suppression hearing for clear error, and reviews de novo the application of constitutional standards to the facts. *People v Williams*, 472 Mich 308, 313 (2005); MCR 2.613(C). Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake. *People v Farrow*, 461 Mich 202, 209 (1999). This Court gives deference to the trial court's resolution of factual issues, particularly where witness credibility is involved, and may not substitute its judgment for that of the trial court and make independent findings. MCR 2.613(C); *Farrow*, 461 Mich at 209.

ARGUMENT

I. The knock and talk performed at Van Doorne's home was unreasonable and violated the Fourth Amendment.[1]

The actions of KANET in this case violated Van Doorne's implied license to enter his property because they did not behave in a fashion expected from a reasonable visitor. Rather, KANET's actions objectively demonstrated an intent to search, which Van Doorne's implied license did not permit. Accordingly, the knock and talk performed on Van Doorne's residence exceeded the scope of a constitutional knock and talk.

A. The Fourth Amendment requires that law enforcement officers conducting a knock and talk act as ordinary, reasonable visitors.

Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures, which extends to the curtilage around a home.[2] *People v Champion*, 452 Mich 92, 97 (1996); *Oliver v United States*, 466 US 170, 180 (1984); US Const, Am IV, XIV; Const 1963, art 1, § 11. Generally speaking, a search or seizure of a home or its curtilage conducted without a warrant is per se unreasonable unless it falls within a clearly delineated exception to the warrant requirement. *Champion*, 452 Mich at 98. The State bears the burden of establishing that an exception to the warrant requirement applies. *Hardesty v Hamburg Twp*, 461 F3d 646, 655 (CA 6, 2006). Absent a compelling reason to impose a different interpretation, this Court construes the Michigan Constitution to provide the same protection as

[1] This Court requested that three issues be briefed in its June 10, 2016 Order. However, the first two issues, implied license and objective intent to search, are naturally intertwined as part of the Supreme Court's analysis in *Jardines*. As such, those issues are addressed in a larger analysis of the Fourth Amendment. But, under that umbrella issue, both implied license and objective intent are addressed in turn. *See*, *infra*, Sections I(B)(1)-(2).

[2] This section borrows from the Appellee's Brief on Appeal in the case *People v Radandt*, Dkt. No. 150906. Van Doorne believes that the statements of law prepared by the Solicitor General could not be rewritten in a more succinct and eloquent fashion.

the Fourth Amendment of the United States Constitution. *People v Levine*, 461 Mich 172, 178 (1999).

One exception to the warrant requirement is the "knock and talk." *Schneckloth v Bustamonte*, 412 US 218, 219 (1973). As a general proposition, a knock and talk is neither a search nor seizure, but rather an investigative technique designed to gain voluntary consent to questioning or a search. *United States v Thomas*, 430 F3d 274, 277 (CA 6, 2005). The ability of law enforcement to knock on a door and attempt to engage citizens in a conversation is rooted in the concept of ordinary citizen contact, that is, law enforcement have no more authority than any private citizen would. *See Kentucky v King*, 563 US 452, 469 (2011); *People v Frohriep*, 247 Mich App 692 (2001) (holding that the police may approach a residence and attempt to engage in a conversation as this is ordinary citizen contact). The Michigan Court of Appeals, in *Frohriep*, defined a knock and talks as follows:

> Generally, the knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items.
>
> *Id.* at 697 (internal citations omitted).

Generally speaking, knock and talks are a permissive law enforcement tactic. However, as actually employed, knock and talks are often not performed in a manner that could be described as ordinary citizen contact. As one commentator noted, "[t]he Supreme Court has set out a roadmap for challenging one of the most insidious police tactics used today . . . . [t]he path is short and clear and it leads to the inescapable conclusion that the knock-and-talk – as it is actually employed in practice – is unconstitutional." Jamesa J. Drake, *Article: Knock and Talk No More*, 67 ME. L. REV. 25, 26 (2015).

In *Florida v Jardines*, 569 US ___, 133 S Ct 1409 (2013), the Supreme Court recently explained the boundaries of the knock and talk. In *Jardines*, police dispatched a surveillance team to Jardines's house after receiving a tip that he was growing marijuana. *Id.* at 1413. After watching the home for fifteen minutes, two detectives approached the front porch with a trained drug-sniffing dog. *Id.* As the officers approached, the dog explored the area and detected drug odors at the base of the front door. At that point, the detectives left and obtained a search warrant. *Id.* At no point did they knock on Jardines's door or make any attempt to contact him.

The Supreme Court held that a search had occurred. In so doing, the Court reasoned that the detectives had exceeded the scope of the implied license extended to visitors to enter Jardines's curtilage. *Id.* at 1415. The Supreme Court applied traditional property principles to the facts and reasoned that the police may not enter the curtilage "to engage in conduct not explicitly or implicitly permitted by the homeowner." *Id.* at 1414. Because Jardines's front porch was a constitutionally protected area, the Court questioned whether the detectives had entered it through an unlicensed physical intrusion, which required the Court to consider the scope of the implied license for visitors to enter Jardines's curtilage. *Id.* at 1415.

Ultimately, the Court held that the scope of the license is "implied from the habits of the country[.]" *Id.* According to the *Jardines* Court:

> We have accordingly recognized that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers, and peddlers of all kinds. This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because *that is no more than any private citizen might do.*
>
> *Id.* at 1415-1416 (internal citations and quotations omitted) (emphasis added).

The Supreme Court found there had been a "search," as the police officers in *Jardines* had physically intruded onto a constitutionally protected area. After determining that a search occurred, the Court then analyzed whether said entry onto the curtilage "was accomplished through an unlicensed physical intrusion… [and] whether [Jardines] had given his leave (even implicitly) for them to do so." *Id.* at 1415. The *Jardines* Court focused its attention on the scope of an implied license that is extended by societal norms, and the "objective reasonableness" of the search. Its emphasis on objective reasonableness makes sense, as the Fourth Amendment does not serve to limit all searches but, rather, only protects against *unreasonable* ones. The *Jardines* court stated,

> . . . the question before the court is precisely *whether* the officer's conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered.

Id. at 1416-1417 (emphasis in original).

Thus, the final holding of *Jardines* was that an unreasonable search had occurred. Reaching this conclusion required an expansive inquiry and analysis into various factors, including the *context* and *reasonableness* of the officers' actions.

Jardines confirmed the principle that the constitutionality of a given knock and talk is context-dependent and determined by the facts of each case. *Frohriep*, *supra*, 247 Mich App at 698–699. The Fourth Amendment "does not impose a 'one size fits all' rule of police investigation"; instead, the ultimate touchstone is reasonableness, determined by the totality of the circumstances facing the officer. *Williams*, 472 Mich at 316–317; *Kentucky v King*, 131 S Ct 1849, 1856 (2011); *Samson v California*, 547 US 843, 848 (2006). In sum, law enforcement actions must still be reasonable and conform to the homeowner's implied license.

B. KANET did not behave as reasonable visitors when knocking on Van Doorne's door; therefore, their actions cannot be categorized as a lawful knock and talk.

Law enforcement officers, like ordinary citizens, have an implied license to enter onto another's land, approach the home, and attempt to engage the occupants in consensual conversation. That did not occur here. Rather, KANET violated Van Doorne's implied license by arriving at 5:30 a.m. with seven officers and knocking for too long. KANET further violated Van Doorne's implied license because they approached Van Doorne's home with the intent to search for, and seize, the marijuana butter they knew was there. Just like ordinary citizens, law enforcement officers may not approach a home with the intent to conduct a search.

Recently, the Ninth Circuit Court of Appeals in *United States v Lundin*, 817 F3d 1151 (CA 9, 2016), considered a knock and talk case post-*Jardines*. In *Lundin*, a kidnapping victim was interviewed in the early morning hours. *Id.* at 1155. Following the interview, the officer requested a "be on the lookout" and that the suspect, Eric Lundin, be arrested. *Id.* at 1156. Arcata Police Department Officer Matthew O'Donovan used vehicle registration data to find Lundin's address and drove to the house. *Id.* When he arrived, he saw lights on in the home and Lundin's Dodge truck parked in the driveway. *Id.* Officer O'Donovan called for backup; three officers responded in support. *Id.* At approximately 4:00 a.m. three of the officers approached the front door and knocked loudly. *Id.* After a second knock, the officers heard loud crashing noises coming from the backyard and they ran to the backyard and heard someone moving. *Id.* The officers ordered the person in the backyard to come out and Lundin exited and was immediately arrested. *Id.* Officers then searched Lundin's home and backyard, finding two firearms. *Id.*

The Ninth Circuit upheld the district court's opinion and suppressed the evidence because the officers exceeded the scope of Lundin's implied license when they knocked on his door at 4:00 a.m. without a warrant with the intent of arresting Lundin. As the Ninth Circuit noted, "[t]he

presumption against warrantless searches and seizures 'would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity.'" *Lundin*, 817 F3d at 1158 (quoting *Jardines*, 133 SCt at 1414). The *Lundin* Court further reasoned:

> The scope of the exception is coterminous with this implicit license. Stated otherwise, to qualify for the exception, the government must demonstrate that the officers conformed to "'the habits of the country,'" *id.* (quoting *McKee v. Gratz*, 260 U.S. 127, 136, 43 S. Ct. 16, 67 L. Ed. 167 (1922) (Holmes, J.)), by doing "'no more than any private citizen might do,'" *id.* at 1416 (quoting [*Kentucky v King*, 563 U.S. 452, 469 (2011)].

Id. at 1158-1159.

Beyond the scope of the implied license, knock and talks are also limited based on the purpose for which an officer approaches a home. The implied license "to approach a home and knock is generally limited to the purpose of asking questions of the occupants." *Id.* at 1159 (internal citation omitted). The *Lundin* Court determined that knocking on the door of a home for another purpose would generally exceed the scope of the implied license and, thus, not qualify as a knock and talk. *Id.*

Here, KANET violated the Fourth Amendment by exceeding Van Doorne's implied license and objectively demonstrating their intent to search, rather than converse.

1. By arriving at 5:30 a.m. with seven officers and knocking on Van Doorne's door excessively, KANET exceeded the scope of Van Doorne's implied license and violated the Fourth Amendment.

Van Doorne is presumed by law to extend an implied license to all visitors, invited or otherwise. This implied license is based on normal societal rules that are gleaned from a lifetime worth of common sense. Van Doorne's implied license, however, did not encompass KANET's actions in the early morning hours of March 17, 2014.

Similar to *Jardines*, there is no dispute that there was a search in this case. Seven officers entered the curtilage of Van Doorne's home – a constitutionally protected area. *Jardines*, 133 S Ct

at 1417 ("One virtue of the Fourth Amendments property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred."). The remaining inquiry then, whether the officers' entry into Van Doorne's curtilage "was accomplished through an unlicensed physical intrusion" and whether Van Doorne had given his "leave (even implicitly) for them to do so." *Id.* at 1415. A knock and talk that is performed in violation of the implied license no longer qualifies as an exception to the warrant requirement of the Fourth Amendment. *Jardines*, 133 S Ct at 1417. And, any search without a warrant is "per se unreasonable." *Katz v United States*, 389 US 347, 357 (1967).

The *Jardines* majority reasoned that, "a license may be implied from the habits of the country." *Id.* at 1415 (quoting *McKee v Gratz*, 260 US 127, 136 (1922)). It would seem obvious that the habits of the country do not include uninvited visits at 5:30 a.m., absent some indication that the person accepts visitors at that hour or, where it is clearly observed that someone is awake in the home. *See Lundin*, 817 F3d at 1158-1159 (reasoning that "unexpected visitors are customarily expected to knock on the front door of a home only during normal waking hours.").

All nine justices in *Jardines* (with varying degrees of agreement) accepted the proposition that the general implied license to approach someone's front door extends only during daylight hours. *Jardines*, 133 S Ct at 1422 (Alito, J., dissenting) ("Nor, as a general matter, may a visitor come to the front door in the middle of the night without an express invitation."); *Id.* at 1416, n. 3 (majority op.) ("the dissent quite rightly relies upon" the proposition that a typical person would be greatly alarmed by nighttime intrusions "to justify its no-night-visits rule").

In his *Jardines* dissent, Justice Alito cited an Idaho Court of Appeals case, which noted that a late-night approach would more quickly subvert an implied license than a drug-sniffing

canine at the door of one's home. *Jardines*, 132 S Ct at 1422-23 (Alito, J., dissenting) (citing *State v Cada*, 923 P2d 469, 478 (Idaho Ct App 1996). Perhaps with a wary eye to a trend in police tactics, the Idaho Court of Appeals noted: "Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors. Indeed, if observed by a resident of the premises, it could be a cause for great alarm." *Cada*, 923 P2d at 478. Similarly, the Seventh Circuit Court of Appeals, in *United States v Jerez*, 108 F3d 684, 690 (CA 7, 1997), noted:

> Our jurisprudence interpreting the Fourth Amendment has long recognized that police encounters at a person's dwelling in the middle of the night are especially intrusive. Indeed, the special vulnerability of the individual awakened at the privacy of his place of repose during the nighttime hours to face a nocturnal confrontation with the police was recognized in the common law that antedates our separation from England.

As discussed by the Ninth Circuit Court of Appeals in *Lundin*, *supra*, law enforcement officers entered the curtilage of a suspect's residence at 4:00 a.m. to locate and arrest him. The police saw lights on inside the home and knocked on the door. The *Lundin* Court noted that four o'clock in the morning is not a time that most residents extend an implied license for strangers to visit:

> First, unexpected visitors are customarily expected to knock on the front door of a home only during normal waking hours. This does not mean that the "knock and talk" exception never applies when officers knock on the door of a home in the early morning. In some circumstances, an early morning visit may be "consistent with an attempt to initiate consensual contact with the occupants of the home." [*United States v Perea-Rey*, 680 F3d 1179, 1188 (CA 9, 2012)]. For example, officers may have reason to believe that the resident in question generally expects strangers on his porch early in the morning — perhaps he sells fresh croissants out of his home. Or the officers may have a reason for knocking that a resident would ordinarily regard as important enough to warrant an early morning disturbance — perhaps a fox has gotten into the resident's henhouse. Here, however, the officers knocked on Lundin's door around 4:00 a.m. without evidence that Lundin generally accepted visitors at that hour, and without a reason for knocking that a resident would ordinarily accept as sufficiently weighty to justify the disturbance. Indeed, the officers here acted for a purpose that virtually no resident would willingly accept.

Id. at 1159.

As such, the Ninth Circuit held that entering the curtilage at four in the morning to locate and arrest a suspect, despite the fact that the lights were and his truck was in the driveway, was not a lawful knock and talk.

The Alaska Court of Appeals engaged in a lengthy discussion of the practical application of the implied license model. In *Kelley v State*, 347 P3d 1012 (Alas Ct App 2015), two Alaska state troopers, acting on an anonymous tip, drove up a defendant's driveway shortly after midnight. The troopers remained in their car for several minutes, sniffing the air. *Id.* at 1013. After they detected an odor of marijuana, the troopers left and obtained a search warrant. *Id.* The defendant challenged the officers' violation of the implied license to approach her home in such a manner. The trial court denied the defendant's motion to suppress, reasoning that the driveway to the home was impliedly open to public use because it provided public ingress to and egress from her property. *Id.*

The Alaska Court of Appeals reversed. In so doing, the Alaska Court of Appeals recognized *Jardines'* holding that a police officer has an implicit license to approach a home without a warrant and knock on the front door because it is no more than a private citizen might also do. *Id.* at 1014. It also pointed out, however, that in *Jardines* the United States Supreme Court recognized that the scope of the implicit license limited the manner of the visit:

> To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police.
>
> *Kelley*, 347 P3d at 1014 (quoting *Jardines*, 133 S Ct at 1416).

The *Kelley* Court thus found that the manner of the visit was of paramount importance to the *Jardines* reasoning and framework for determining the scope of an implied license. Because

the search took place after midnight, it reasoned that the search was more intrusive than that in *Jardines*. *Id.* at 1014.

The Kentucky Supreme Court, in *Commonwealth v Ousley*, 393 SW3d 15 (KY, 2013), a pre-*Jardines* decision, ruled on the constitutionality of a trash-pull in the curtilage. A police officer, without attempting to make contact with the homeowner, walked up to Ousley's home near midnight and conducted two trash pulls on different nights. *Id.* at 19. The garbage cans were touching the home. *Id.*

The Kentucky Supreme Court, relying on *Jardines*' predecessor, *United States v Jones*, 565 U.S. ___, 132 SCt 945 (2012), determined that unlicensed intrusions into the curtilage of a home undercuts the constitutionality of police action. *Ousley*, *supra*, at 23. The curtilage may be invaded, so long as the invasion comports with the occupant's implied license:

> Surely there is no reasonable basis for consent to ordinary public access, presumed or otherwise, for the public to enter one's property at midnight absent business with the homeowner. Girl Scouts, pollsters, mail carriers, door-to-door salesmen just do not knock on one's door at midnight; and if they do, they are more likely to be met by an enraged (and possibly armed) resident than one with a welcoming smile.
>
> *Id.* at 30.

The Kentucky Supreme Court concluded its analysis as follows:

> Thus, just as the police may invade the curtilage without a warrant only to the extent that the public may do so, they may also invade the curtilage only *when* the public may do so. Absent an emergency, such as the need to use a phone to dial 911, no reasonable person would expect the public at his door at the times the police searched Ousley's trash.
>
> *Id.* at 31 (emphasis in original).

Other courts have similarly ruled that nighttime intrusions by police officers fall outside the scope of the implied license. As such, they were warrantless searches in violation of the Fourth Amendment. *See, e.g.*, *People v Burns*, 25 NE3d 1244 (Ill App, 2015) (condemning warrantless

use of drug-sniffing dog at an apartment door at 3:20 a.m.); *State v Ross*, 4 P3d 130, 136 (Wash, 2000) (suppressing evidence where police used driveway to enter property as 12:10 a.m. to search for evidence of a marijuana grow, with no intention of contacting defendant); *State v Johnson*, 879 P2d 984, 991-993 (Wash App, 1994) (noting that the danger of a "violent confrontation" is considerably higher during a 1:00 a.m. incursion).

The facts in the present case are far more malignant than both *Lundin* and *Kelley*. In *Lundin*, the officers arrived at Lundin's home and saw lights on inside, which could clearly indicate that someone was still awake inside. In *Kelley*, the officers arrived slightly after midnight, arguably a time when more people are likely to be awake, and never bothered the homeowner by knocking on the door. Nevertheless, in both *Lundin* and *Kelley*, both the Ninth Circuit and Alaska Court of Appeals respectfully, determined that the officers' actions violated the Fourth Amendment.

Here, when KANET arrived at Van Doorne's home, the testimony demonstrated that *no* lights were visible and it appeared that everyone was asleep. Yet, the trial and appellate courts both determined that there was no Fourth Amendment violation, because, in their collective opinions, *no search had even occurred*. This reasoning flies in the face of both Supreme Court precedent and common sense. As noted earlier, because there was a physical intrusion onto Van Doorne's curtilage, *there was a search*. Reasonableness is now the question. There can be no doubt that this blatant violation of Van Doorne's implied license was not reasonable.

In the present case, seven members of KANET entered Van Doorne's curtilage in the pre-dawn hours. Lt. Roetman testified that when KANET arrived at Van Doorne's home, all the lights were off in the home and everyone appeared to be asleep. There can be no honest dispute that Van Doorne does not "sell[] fresh croissants out of his home," at 5:30 a.m. or that a fox was in his

henhouse. *Lundin*, 817 F3d at 1159. Van Doorne did not extend a license, implicitly or explicitly, to uninvited visitors at that hour.

It seems self-evident that the societal norms, which dictate acceptable behavior and the scope of implied licenses, would not allow an uninvited visitor to knock at such an hour and ask for a cup of sugar, to borrow an egg, or attempt to sell a vacuum cleaner. In fact, Sgt. Kaechele testified that, in his opinion it would not be criminal for a group of Jehovah's Witnesses or Girl Scouts to knock on his door at 4:00 a.m., it would be inappropriate and something that should not be done. (Tr. 6/30/14, 90:15-91:3).

Testimony in this case presents something even more insidious: the commanding officer was, and continues to be, under the impression that the time of day does not matter for performing a knock and talk. Lt. Roetman testified: "We could've waited two hours. We could have gone earlier. We could've gone to [Van Doorne's] house instead of Mr. Tennant's first. I mean, *time is irrelevant*." (Tr. 7/2/14, 21:4-7) (emphasis added). This testimony, from a high-ranking officer, demonstrates an ignorance of the scope of the implied license which permits a knock and talk. The use of late-night knock and talks is not uncommon, and not limited to this case. One detective indicated he has personally performed at least ten "knock and talks" at 1:00 a.m. or later as part of KANET's normal investigations – without a warrant or exigent circumstances. (Tr. 6/30/14, 33:1-21). KANET utilizes knock and talks because they are convenient, rather than worrying about the requirements of the Fourth Amendment. However, the Fourth Amendment is "not grounded in expediency." *Carman v Carroll*, 749 F3d 192, 199 (CA 3, 2014) (rev'd on other grounds).

The State would have this Court believe that Van Doorne is requesting a bright-line rule that no "afterhours" knock and talks are permissible. This position, however, is erroneous. An implied license is not so difficult to interpret. As stated by Justice Scalia in *Jardines*, "[c]omplying

with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." 133 SCt at 1416. If there was evidence that Van Doorne, or any other citizen, received visitors or sold croissants at 5:30 a.m., it could be acceptable for law enforcement to perform a knock and talk at such an otherwise unreasonable hour. In this case, there was no such indicia. Therefore, the Court should not accept the State's specious argument.

The time of the knock and talk is not the only evidence that the KANET Team violated Van Doorne's implied license. According to multiple different witnesses, the incessant pounding and doorbell-ringing went on for two to four minutes and woke all of the occupants. At least seven officers arrived at Van Doorne's home in at least four vehicles. (Tr. 6/30/14, 25:18-26:16). Of those seven officers, at least four of them were standing in Van Doorne's doorway when the knocking commenced. (*Id.* at 30:6-11).

Van Doorne did not extend an implied license to groups of seven visitors to arrive at his doorstep *en masse.* There is nothing to suggest that Van Doorne manifested an implied license to the general public that his home was open to approach in such a manner and by so many members of law enforcement. The implied license to approach a home does allow for social visitors – such as the Girl Scouts – to approach the door and attempt to engage in a consensual encounter. However, the Girl Scouts do not approach a home in the middle of the night, seven at a time, causing a ruckus and awakening all of the occupants.

As the *Jardines* opinion highlights, officers may "'knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave.'" *Jardines*, 133 S Ct at 1415. An implied license generally invites an uninvited guest to knock on the door and briefly wait for an answer. It seems to go without saying that this implied license does not allow a guest to pound on

a door and ring the doorbell repeatedly until the homeowner answers the door. In addition, it is only common sense to conclude that a home that is completely dark without movement inside at 5:30 a.m. is a generally accepted indication that its occupants are asleep. No uninvited visitor would think they had an implied license to pound on the door and ring the doorbell awakening the occupants in order to sell the occupants a product or deliver a package. This would be unacceptable behavior for a member of the public, and, as such, was also unacceptable behavior for the police.

The sum total of law enforcement actions in the instant case demonstrates that the invasion onto Van Doorne's curtilage was done in violation of his implied license. As such, the intrusion cannot be categorized as a knock and talk. Rather, KANET performed a warrantless search in violation of the Fourth Amendment.

2. KANET demonstrated an objective intent to search which *Jardines* does not permit.

Law enforcement officers may not approach a home under the guise of a knock and talk with the intent to conduct a search or arrest an occupant. *See Jardines*, 133 SCt at 1416; *Lundin*, *supra*. The knock and talk exception, in part, turns on *why* law enforcement entered the curtilage. KANET actions, when viewed objectively, demonstrated an intent to conduct a search of Van Doorne's home. The implied license does not authorize such action, and as such, a Fourth Amendment violation occurred.

Where the officers' behavior "objectively reveals a purpose to conduct a search" the implied license is no longer extended because conducting a search "is not what anyone would think [they] had a license to do." *Jardines*, 133 SCt at 1417. The *Jardines* holding requires an analysis of the attendant circumstances in order to determine whether the officers' actions show an intent to search.

For a police officer to avail himself of the knock and talk exception to the warrant requirement, both the initial entry onto the property *and* the subsequent conduct on the property must be reasonable and not objectively indicate that the officers' purpose was to initiate a warrantless search. *Jardines*, 133 S Ct at 1417. The license customarily provided is generally limited to the "'purpose of asking questions of the occupants.'" *Lundin*, 817 F3d at 1159 (quoting *Perea-Rey*, 680 F3d at 1187 (internal citation omitted)). The Ninth Circuit continued: "Officers who knock on the door of a home for other purposes generally exceed the scope of the customary license and therefore do not qualify for the 'knock and talk' exception." *Lundin*, 817 F3d at 1159.

The *Lundin* Court noted that, to a certain extent, the *subjective* intent of the officers should also play a role in determining the scope of the knock and talk in question. *Lundin*, 817 F3d 1159-1160. The court reasoned that:

> The application of the 'knock and talk' exception ultimately 'depends upon whether the officers ha[ve] an implied license to enter the [curtilage], which in turn depends upon the purpose for which they enter' . . . . After Jardines, it is clear that, like the special-needs and administrative-inspection exceptions, the 'knock and talk' exception depends at least in part on an officer's subjective intent.
>
> *Id.*

In the present case, the circumstances show that KANET subjectively intended to conduct a search of Van Doorne's home. At least two of the law enforcement officers present on the night of the raid indicated that they had probable cause and could have obtained a search warrant. (Tr. 6/30/14, 99:21-100:13); (Tr. 7/2/14, 5:4-5). However, the law enforcement officers decided against obtaining a warrant as it would have been inconvenient and taken an extended period of time. (Tr. 6/30/14, 67:11-15); (Tr. 6/30/14, 65:9-15). There was also testimony during the evidentiary hearing that Lt. Roetman indicated that KANET chose not to obtain search warrants because a public record would draw media attention to the KCSD. (Tr. 7/14/14, 17:19-25). Lt. Roetman

confirmed that had the officers obtained search warrant, it would be in the record and the "media would get ahold of it right away." (Tr. 7/2/14, 24:6-9).

These statements indicate that the officers were aware of their ability to obtain a warrant, aware that they had sufficient probable cause, and yet decided to not obtain one. Based on this testimony, the officers' subjective intent was to search Van Doorne's home – just without the publicity and inconvenience of obtaining a warrant.

The United States District Court for the Western District of Michigan, in *United States v Ferguson*, 43 F Supp 3d 787, 792 (WD Mich, 2014) (Neff, J.), ruled that a knock and talk violated the Fourth Amendment because the officers revealed an objective intent to search. In *Ferguson*, drug enforcement officers received a tip about an illegal marijuana grow operation. *Id.* at 789. Two detectives arrived at the residence at 7:00 p.m. ostensibly to conduct a knock and talk. *Id.* The officers immediately smelled marijuana when they exited their vehicles and began to question the owner of the property. *Id.* The officers then asked how they could get into the garage where Ferguson maintained his grow rooms. *Id.* After that, the officers, without a warrant, opened the garage and began to search. *Id.* at 790.

The district court ruled that absent the defendant's consent to search, government procurement of information by physically intruding on a person's home is "undoubtedly" a violation of the Fourth Amendment. *Ferguson*, 43 F Supp 3d 787, 792 (citing *Jardines*, 133 S Ct at 1414). "[T]he police detectives' actions and inquiries reveal a purpose to conduct a search to support or contradict the information they had received of an illegal marijuana grow." *Ferguson*, 43 F Supp 3d at 792. The court ruled that Ferguson's implied license did not extend to uninvited, objective searches without a warrant, and as such suppressed the evidence as a violation of the Fourth Amendment. *Id.*

The objective intent of the officers is best shown by the events which unfolded in Van Doorne's driveway. Besides the time of the search, the officers' approach to the residence indicated that this "knock and talk" was intended to be more than mere conversation. Seven officers arrived at the home in four vehicles. Van Doorne testified the vehicles were parked in the driveway with their lights shining into his home. Two of Van Doorne's superior officers repeatedly pounded on the door and rang the doorbell for two to four minutes. Two more officers lingered a few feet behind the "knockers." Three more waited in the driveway. Not surprisingly, the first statement from the commanding officer was to advise Van Doorne: "we're here about the butter." (Tr. 7/2/14, 106:12-23). This statement clearly shows that the purpose of the intrusion was to gather evidence. KANET was not there with the benign goal of asking Van Doorne to answer some questions. Even before the officers arrived at Van Doorne's home, the facts show an objective intent to engage in more than a consensual conversation. Two members of KANET indicated that they had probable cause and could have obtained a search warrant. (Tr. 6/30/14, 99:21-100:13); (Tr. 7/2/14, 5:4-5). However, KANET decided against obtaining a warrant because it would have been inconvenient, taken an extended period of time, and subjected the KCSD to bad press. (Tr. 6/30/14, 67:11-15); (Tr. 6/30/14, 65:9-15).

Had Van Doorne's neighbors looked out of their windows (which they would not have because they were ostensibly asleep) they would have assumed that a warrant was being executed. Van Doorne suggests that the Court can apply a simple test: the "Objective Neighbor Test". This test is easy to apply: if an objective neighbor were to view the events, would they think that law enforcement was trying to talk with their neighbor or serve a warrant.

When viewed objectively, no objective neighbor would conclude that KANET was at Van Doorne's home to engage him in a consensual conversation. The number of officers who

approached the home, the number of cars that littering the driveway (with their lights trained on the house), the time of day, and manner of "knocking" eviscerates any indicia that this was a knock and talk. This was an unconstitutional search.

The Court, therefore, should reject the notion that KANET was simply going to Van Doorne's home to talk with him, in an attempt to gain his consent. KANET's purpose was to search Van Doorne's home. Under *Jardines*, entering the curtilage with such a purpose is impermissible.

C. By ruling for the State, this Court would uphold a decision that in incongruous with *Jardines* and prevailing national precedent.

As discussed, *supra*, the sum total of KANET's actions leads to the inescapable conclusion that this knock and talk was impermissible. It violated the Fourth Amendment as an unreasonable search. In stark contrast to this otherwise seemingly obvious conclusion, the Court of Appeals determined that no *search had occurred* and failed to even address the reasonableness of the police action.

Based on the precedent contained herein, the Court of Appeals errors are substantial. Upholding an opinion so adverse to the basic principles put forth in *Jardines* would represent a considerable regressive step for the State of Michigan and its Fourth Amendment jurisprudence.

However, not only is the Court of Appeals' opinion contrary to prevailing federal law, it also runs contrary to prevailing national precedent. In *People v Galloway*, 259 Mich App 634 (2003), the appeals court reasoned that knock and talks generally do not implicate the Fourth Amendment because it relies on ordinary citizen contact. *Galloway*, 259 Mich App at 640.

In *Galloway*, law enforcement conducted helicopter flyovers in search of marijuana. *Id.* at 636. Someone in the helicopter spotted planters and materials in Galloway's back yard and coordinated a ground team that approached the home. *Id.* at 637. The officers that arrived on scene

bypassed the front door and proceeded directly to the back yard of the home where they spotted a number of marijuana plants under a lean-to attached to the back of the home. *Id.*

The *Galloway* Court determined that using a helicopter with coordinated ground units – who invaded the homeowner's back yard – was not ordinary citizen contact. *Id.* at 640. The court continued:

> Merely characterizing a law enforcement maneuver as a knock and talk does not warrant judicial bypass of constitutional safeguards against unreasonable searches and seizures. As this Court prophetically observed in *Frohriep*, *id.* at 701 'we can envision a situation where the police conduct when executing the knock and talk procedure indicates an unreasonable seizure or results in an unreasonable search . . . .'"
> *Id.* at 642.

The ordinary citizen contact test established in *Frohriep* and *Galloway* must be discarded as it offers little practical protection under the Fourth Amendment. The Court of Appeals opinion in the present case gave its blessing to the pre-dawn intrusion and attendant circumstances, characterizing it as ordinary citizen contact. In so doing, the Court of Appeals brushed aside cases from around the nation that have cautioned or struck down police actions less insidious than those of KANET.

If, as the Court of Appeals has ruled, that the facts in this case do not implicate Fourth Amendment protections, under what circumstances then, would the Fourth Amendment protect against unreasonable searches in the context of a knock and talk? If entering upon the curtilage with seven officers at 5:30 a.m. is not a "search", then what would constitute a search under Michigan's current knock and talk framework? In sum, it is simply not possible to harmonize the opinion in the present case with *Jardines* and prevailing national caselaw.

This Court should not allow the Court of Appeals opinion to bring our state's Fourth Amendment protections to such a conspicuous low point. There was nothing "ordinary" about the citizen contact in this case. As applied by the Court of Appeals, *Frohriep* and *Galloway* offer little

protection against unreasonable knock and talks. This Court should discard the current knock and talk framework. In its place, this Court should adopt the implied license theory set forth by *Jardines*, *Ousley*, *Kelley*, *Lundin*, and other national precedents.

II. KANET's persistent knocking at 5:30 a.m., along with the rank and number of officers, caused the knock and talk to become unconstitutionally coercive.

KANET's actions were coercive. After executing a search warrant earlier in the night, the entire KANET warrant-execution team descended on Van Doorne's home under cover of darkness. Two members of the warrant-execution team, Sgt. Kaechele and Lt. Roetman, officers with a superior rank to Van Doorne, stood immediately outside the door. The two superior officers took turns knocking and ringing the doorbell for two to four minutes. The totality of these actions were intentional and calculated to coerce Van Doorne to consent.

A reasonably executed knock and talk does not *generally* carry indicia of a coercive encounter. However, in certain instances, like the present case, the facts may transform an otherwise constitutionally permissible knock and talk into a coercive encounter where consent – although given – is not free and voluntary.

A person can waive their Fourth Amendment right against unreasonable searches and seizures by providing consent. However, "consent has effect only if it is given freely and voluntarily." *United States v Carter*, 378 F3d 584, 587 (CA 6, 2004). The United States Supreme Court, in a landmark case held:

> The Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.
> *Schneckloth*, *supra* at 228.

Voluntary consent must be "unequivocal and intelligently given, untainted by duress or coercion." *United States v Cooke*, 915 F2d 250, 252 (CA 6, 1990). Consent to search "permits a search and

seizure without a warrant when the consent is unequivocal, specific, and freely and intelligently given." *Galloway*, *supra*, 259 Mich App at 648 (citations omitted). "The validity of a consent depends on the totality of the circumstances." *Id.*

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness – what would the typical person have understood by the exchange between the officer and the suspect." *Frohriep*, 247 Mich App at 703. If the government seeks to rely upon consent to justify the lawfulness of a search, it must show that consent was freely and voluntarily given. *People v Chowdhury*, 285 Mich App 509, 524 (2009).

The cornerstone of a constitutional knock and talk is consensual and voluntary conversation between police and citizens. Some courts, therefore, do not delve into a full inquiry on the issue of consent. Instead, these courts analyze whether the homeowners were coerced into opening the door and inviting officers inside.

The Eight Circuit Court of Appeals, in *United States v Spotted Elk*, 548 F3d 641 (CA 8, 2008), examined whether a knock and talk became a non-consensual encounter in violation of the Fourth Amendment. After receiving a tip that two hotel rooms smelled of marijuana, an officer responded with the hotel manager. *Id.* at 654. The officer approached Geraldine Blue Bird's room in the middle of the day and knocked on the door. *Id.* The officer peeked in the peephole and saw some movement inside. *Id.* The officer and manager went to the adjoining room and knocked again while announcing "front desk" at both rooms. *Id.* Blue Bird answered the door of her own accord. *Id.* at 655.

The Eighth Circuit held that there were no facts to show Blue Bird was coerced to open the door. *Id.* In so doing, the *Spotted Elk* Court reasoned that "a police attempt to 'knock and talk' can become coercive if the police assert their authority, refuse to leave, or otherwise make the people

inside feel they cannot refuse to open up...." *Id.* at 655 (citing *United States v Poe*, 462 F3d 997, 1000 (CA 8, 2006); *United States v Connor*, 127 F3d 663, 666 (CA 8, 1997)). The police contact in *Spotted Elk* did not demonstrate coercion: "[t]he encounter happened in mid-day,[the police] did not command her to open the door, nor was there any suggestion that his knocking was unusually persistent." *Id.* (citing *United States v Crasper*, 472 F3d 1141, 1146-1147 (CA 9, 2007). Furthermore, citizens are more vulnerable in their dwelling places at night; there is an inherent abrasiveness to police interaction with police in the nighttime hours. *See Jerez*, 108 F3d at 690-91.

As discussed *supra* in *Ferguson*, the district court noted that the warrantless search was not consensual in "the context within which Defendants 'cooperated' with the police." *Ferguson*, 43 F Supp 3d at 793. The *Ferguson* Court reasoned, "Willingness to cooperate with the police is not viewed in a vacuum. . .", but instead must be viewed from the totality of the circumstances. *Id.* Cooperation was in response to the general authority exerted by two police officers on private property in the face of evidence implicating them in a crime. *Id.* at 794. Even though the officers in Ferguson had told the defendants they were not required to speak with them, "at the time of Defendants' cooperative efforts, and particularly by the time they signed the consent-to-search forms, 'the jig was up.'" *Id.* The Michigan Court of Appeals has held that the time of the knock and talk is a factor under the totality of the circumstances as to what is considered coercive. *People v Sweet*, unpublished opinion per curiam of the Court of Appeals, issued Sept 16, 2003 (Docket No. 239511) (Attachment 1).

In this case, the facts strongly militate against the voluntariness of the search.

KANET arrived at Van Doorne's home at 5:30 a.m., a time (as discussed *supra*) society does not accept as reasonable. The time of KANET's arrival, when juxtaposed with the facts in

Spotted Elk and *Ferguson*, creates a presumption of unreasonableness and coercion. Contrary to Lt. Roetman's testimony, time *does matter*. The Eighth Circuit agreed that time of day is important when deciding whether consent was voluntary. *Spotted Elk*, 548 F3d at 655.

The number of officers present also impacts the voluntariness of consent. Obviously, the greater number of officers, the greater chance that consent was not voluntary. Courts have suggested that more officers makes police action more coercive. *See United States v Washington*, 387 F3d 1060, 1069 (CA 9, 2004). In *People v Gillam*, 479 Mich 253 (2007), this Court reviewed a Sixth Circuit case which discussed how the number of officers impacted coercion:

> The court reasoned that the number of officers present did not always indicate coercion; in finding that four officers was reasonable, the court noted the potential danger of approaching a house believed to contain a drug operation and stated that the officers were permitted to take reasonable security precautions. Similarly here . . . . the officers reasonably sent three officers to defendant's door.
>
> *Id.* at 264.

Here, a total of seven officers arrived at Van Doorne's home. In *Spotted Elk*, only one officer knocked on Blue Bird's door; in Ferguson two detectives arrived on scene and conducted the unlawful knock and talk. In *Galloway*, where the court of appeals held that the "knock and talk" violated the Fourth Amendment, six officers descended on the home. There is no bright-line number that, if breached, would automatically render the consent involuntary. However, seven officers appears to be facially excessive and strongly suggests an improper show of force.

The aggressive knocking on Van Doorne's door and incessant ringing of the doorbell is also indicative of overbearing police action. As recognized in *Sweet*, supra, other circumstances a court might consider when analyzing whether police conduct was coercive include the "type and amount of knocking done by police." *Id.* at *5 (citing *Jerez*, 108 F3d at 705). The *Jerez* Court stated that the longer a police officer knocks at a door, the more difficult it may be for a citizen to

ignore and the less it becomes a consensual encounter. *Id.* at 692. Additionally, in *Connor* the Eighth Circuit upheld a ruling that the officers' conduct was coercive where the officers knocked on the door longer and more vigorously than would an ordinary member of the public. *Connor*, 127 F3d at 666 n. 2. The knocking was loud enough to awaken guests in a nearby room (one nearby guest actually opened her door); several minutes passed before the defendants responded. *Id.*

Here, as Van Doorne testified, KANET pounded on his door and rang his doorbell in deafening succession. Van Doorne testified that "no salesman would have knocked like that. It was not a polite knock. It was an urgent – made me think an emergency or something bad happened." (Tr. 7/2/14, 104:19-21). The knocking was loud and persistent enough that it woke all the occupants of the home.

Finally, Sgt. Kaechele and Lt. Roetman were both officers of a superior rank to Van Doorne. Van Doorne, as a deputy with KCSD, was familiar with, and knew many of the members of, KANET. Specifically, Van Doorne knew Lt. Roetman and was aware he was a superior officer. Van Doorne testified he had no choice but to sign the consent to search form:

> **Q:** Well, at some point, were you asked to sign a document?
> **A:** Yes.
> **Q:** Can you tell us what it was?
> **A:** I believe consent to search.
> **Q:** Why did you sign it?
> **A:** They asked me to. Part of the investigation – I can't say no to a department investigation. I have to comply. *I have to cooperate*. I can't lie, or you lose your job. It's engrained in you from day one that you can screw up at the department, but don't lie. If you lie about it, you screw up, you will get fired. *There's no option; you don't lie and you comply.*
>
> (*Id.* at 113:5-14) (emphasis added).

In fact, testimony established that Sgt. Kaechele called in Lt. Roetman for "consultation" on how to handle the situation. Deputy Butler testified that either Lt. Roetman *or* Sgt. Kaechele

are present for each knock and talk KANET performs. (Tr. 6/30/14, 71:14-24). The State endeavored to prove that Kent County Sheriff Larry Stelma had no impact on how these knock and talks were performed. In fact, Sheriff Stelma testified that he instructed his Chief Deputy Michele Young to tell KANET to "handle the matter the way they'd handle it with any other citizen." (Tr. 7/2/14, 78:12-19). This testimony, however, leaves open the question of why *both* Lt. Roetman *and* Sgt. Kaechele were required to be present for this knock and talk. Sgt. Kaechele testified that Lt. Roetman was only brought out once it was clear that at least four KCSD deputies were implicated in the criminal investigation. (Tr. 6/30/14, 102:1-10). Why was it necessary to bring out a high-ranking officer, who was otherwise not present, unless it was to put pressure on Van Doorne? Lt. Roetman, the highest-ranking officer on scene, made initial contact with Van Doorne. When Van Doorne was coming downstairs, he recognized Lt. Roetman both personally from their time at KCSD *and* as his superior officer. As was established earlier, Van Doorne, because of the nature of the investigation, was under the impression he could not refuse KANET's requests. The presence of Lt. Roetman "sealed the deal" and Van Doorne consented.

Continued knocking and ringing of the doorbell warrants at least an investigation by the resident, especially during early morning hours. There is no way Van Doorne could have ignored the cacophony of noise emanating from his front door. Once alerted to the presence of visitors and recognition of the number of officers, many whom he was familiar with and two who were superior officers, Van Doorne had little choice but to open the door. Particularly, given his concern for his continued employment with the KCSD, there was no simply conceivable way Van Doorne could have not opened the door and refused to speak with the officers.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Defendant-Appellant Todd Van Doorne respectfully requests that this Court grant leave to appeal, reverse the decision of the Court of Appeals, and suppress the evidence obtained in violation of the Fourth Amendment.

Respectfully Submitted,

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July 22, 2016

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ATTACHMENT 1

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BARRY ROBERT SWEET,

Defendant-Appellee.

UNPUBLISHED
September 16, 2003

No. 239511
Jackson Circuit Court
LC No. 01-005781-FH

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

The prosecution appeals as of right the trial court's order dismissing the charge against defendant of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). We reverse and remand for proceedings consistent with this opinion.

I. Facts and Procedural History

The testimony from the evidentiary hearing established that the police witnesses and defendant had, at times, varying accounts of what occurred in the early morning hours of June 29, 2001. Because the trial court did not make any detailed findings of fact on several key issues, we set forth both versions of events.

A. Police Version of Events

On June 29, 2001, Officer Mark Easter stopped an individual for a traffic offense sometime before 3:00 a.m. Easter received information from that individual regarding a residence that possibly had marijuana, and decided to perform a "knock-and-talk" with the residents in order to try and obtain consent to search the residence. Based on the information obtained during the traffic stop, Easter believed that there was a large quantity of marijuana in the residence. Based on the individual's description of the residence, Easter went to a residence on Ganson Street because it had a boat in the front yard. The individual indicated that the residence was an apartment building. Easter requested Officer William Mills to come with the K-9 unit in order to search a vehicle; however, Mills ended up assisting Easter once at the residence.

The front door of the residence was glass with wood trim. There were no lights on inside the residence, and the officers shined a light through the door. Easter testified, "There was a

door off to the left, one directly in front, and a stairway, which I believe that led to another door to the right." Easter did not knock on the front door, but walked in the residence because he believed the exterior door led to other apartments. There was no deadbolt on the front door, and the front door was not locked. Easter indicated that he believed the residence was an apartment building because of the number of doors, the types of locks on the doors, and the fact that there was a peephole on one of the interior doors. Mills testified that he believed the residence was an apartment building because there was no deadbolt lock on the front door, one of the interior doors had a peephole, and there was no personal property in the hallway of the building.

Once inside, Easter approached a door to the left, and Mills went to the door that was straight ahead. Easter and Mills observed that one of the doors on the first floor was slightly opened. Mills was able to look inside the door without touching or moving the door. Easter flashed his light in the door, peered through the door, and saw a green leafy substance he believed to be marijuana along with a handrolled marijuana cigarette in an ashtray. Additionally, Mills also saw what he thought was a marijuana cigarette sitting in the ashtray.

Mills began knocking several times, and defendant eventually came out of a door on the second floor and asked Mills what he was doing. Easter asked defendant if his name was "Barry," and defendant replied affirmatively. Defendant informed the officers that he was living in both the upper and lower level apartments, and the officers asked defendant to come downstairs and talk to them. Easter asked defendant to go inside the room to sit down and talk. Defendant agreed to speak with the officers, and allowed the officers to enter the living room area of the lower level apartment.

Mills picked up the rolled cigarette, smelled it, and determined that it was marijuana. Mills asked defendant if the marijuana was his, and defendant replied affirmatively. Defendant first entered the room and sat down in a chair. Easter and Mills told defendant that he had been advised that defendant had large quantities of marijuana in the residence. Defendant told Mills that there was marijuana in the refrigerator. Mills went to the refrigerator and returned with a small bag of marijuana that was located on a shelf in plain view. Mills told defendant that he believed there was more marijuana. Defendant informed Mills that there was more marijuana in the vegetable bin of the refrigerator, and Mills retrieved two one pound bags of marijuana from the refrigerator.

After Mills retrieved the marijuana, the officers asked defendant for consent to search the remainder of the premises, and defendant signed a consent to search form. No other contraband was found on the premises aside from that located in the ashtray and refrigerator. According to Easter, defendant never told the officers not to enter the house or not to go into the refrigerator. Additionally, Easter testified that defendant did not tell the officers to enter the premises or to leave the premises. Mills indicated that defendant never told him to leave the premises, or that he was unwanted or uninvited.

B. Defendant's Version of Events

Defendant testified that he was the only person living in the house on June 29, 2001. Defendant did not give the police permission to enter his house, and testified that he was "fast asleep." Defendant admitted that the door with the peephole was open approximately six or seven inches; however, defendant testified that "there was no way you could see through that

door from the street." Defendant testified that he was awakened by the police "pounding on the wall in the foyer," and that he "woke up and opened the door at the top of the stairs to see what was going on." The police asked defendant his name, and defendant stated that the police "wanted [defendant] to come down and talk to them." Defendant was very surprised to see the police in his house, and testified that he had not given them permission to be there. According to defendant, he "came downstairs to see what was the problem," and the police "said they were told [he] had some marijuana in the house." As defendant came down the stairs, Easter had the door wide open, and was "pushing it back shut." Defendant testified that when he was in the foyer, he asked the police to leave his house:

> Oh, I asked them once; how it was put, they said they wanted to go in the next room and talk about this. And I said I don't, we can talk about it right here. I said, actually, we can talk about it on the porch.
>
> And again they told me, we want to go in that room. I said I don't. I said it one more time. He stepped forward, crossed his arms like he is now. The other put his hands on his hips, stepped in in [sic] a threatening manner, so I said to them, fine, in a very sarcastic manner.
>
> ***
>
> I opened the door, walked in the room. I was going to go across the room, to sit on my own couch. This time, Officer Mills said, oh no, you have to sit right there, and sort of tweaked at my shoulder and pushed me toward the chair.

Defendant testified that at that point, he did not feel that he could leave. The police officers began questioning defendant, and defendant "felt like [he] was kidnapped in [his] own home. [He] wasn't free to move about." According to defendant, the police only asked for consent to search his house after it had already been searched. However, on cross-examination, the prosecutor and defendant engaged in the following colloquy:

> *Q.* You expressed that that was your preference; did you ever ask them specifically to leave your residence?
>
> *A.* No, I did not use the words to get out or leave my home, no.

Defendant admitted that the police never mentioned or drew their weapons, and that the police were merely holding flashlights.

C. Trial Court's Findings

After closing arguments by both sides, the trial court stated:

> You know, I've never heard of this, I don't think I've ever heard this knock-and-talk procedure. Not a bad idea, I guess. But, you know, as I've been hearing the testimony here, I've been thinking about the matter, and, you know, I think we have to look at all the circumstances of this case, not just of what happened in any particular area.

The trial court focused on the fact that the knock-and-talk occurred at 3:00 a.m., and that in its opinion, the subject of the knock and talk, marijuana, is not particularly dangerous:

> The officers feel that they got some information that this man maybe had some – [defendant] maybe had some marijuana. It's three o'clock in the morning. Marijuana is not particularly, you know, it's not a bomb, or it's not the most dangerous thing in the world, though I think it is dangerous, but it's illegal.
>
> But do we go into people's homes and roust them up at three o'clock in the morning to talk to them about whether or not they have marijuana? Is that the kind of procedure that our police are going to undertake?

The trial court concluded: "No. We don't do business that way. This stinks, gentlemen. This search was unlawful, it was unnecessary. It should never have happened, and the Court is granting the motion." The trial court then dismissed the charge against defendant with prejudice.

II. Analysis

The prosecution argues that the trial court erred in granting defendant's motion to suppress and in dismissing the charges against defendant, because the trial court did not make a determination regarding whether the police action in this case was lawful under the Fourth Amendment to the U.S. Constitution, i.e., whether defendant was seized or whether defendant consented to the search. We agree.

This Court reviews a trial court's factual findings in a suppression hearing for clear error, and we will affirm those findings unless we are left with a definite and firm conviction that a mistake has been made. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). However, this Court reviews de novo the trial court's ultimate ruling on a defendant's motion to suppress. *Id.*

The sole issue for us to resolve is whether the trial court was correct in finding the police contact with defendant and subsequent seizure of the marijuana to be unlawful because it occurred at 3:00 a.m. in defendant's house. In resolving this issue, we first turn to our recent decision in *People v Frohriep,* 247 Mich App 692; 637 NW2d 562 (2001), where we upheld the constitutionality of the "knock and talk" procedure utilized by police in this (and that) case. In *Frohriep*, we noted:

> Generally, the knock and talk procedure is a law enforcement tactic in which the police, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality of illicit items. See, e.g., *United States v Hardeman,* 36 F Supp 2d 770, 777 (ED Mich, 1999); *State v Smith,* 346 NC 794, 796; 488 SE2d 210 (1997); *United States v Zertuche-Tobias,* 953 F Supp 803, 829 (SD Tex, 1996). [*Frohriep, supra* at 697.]

We then went on to conclude, consistent with other cases on this issue, that the occurrence of a "knock and talk" between police and an individual does not alone implicate the constitutional safeguards afforded individuals in the criminal context:

> We conclude that in the context of knock and talk the mere fact that the officers initiated contact with a citizen does not implicate constitutional protections. It is unreasonable to think that simply because one is at home that they are free from having the police come to their house and initiate a conversation. The fact that the motive for the contact is an attempt to secure permission to conduct a search does not change that reasoning. We find nothing within a constitutional framework that would preclude the police from setting the process in motion by initiating contact and, consequently, we hold that the knock and talk tactic employed by the police in this case is constitutional. [*Id.* at 698 (footnote omitted).]

We also decided, however, that police conduct must still be examined under ordinary Fourth Amendment jurisprudence to determine if a search or seizure occurred, and if so, whether either was unlawful. *Id.* at 698-700.

The United States and the Michigan Constitutions both prohibit unreasonable searches and seizures. US Const Am IV; Const 1963, art 1, § 11. "A 'seizure' occurs within the meaning of the Fourth Amendment if, in view of all the circumstances surrounding an encounter with the police, a reasonable person would have believed that the person was not free to leave." *People v Shankle,* 227 Mich App 690, 693; 577 NW2d 471 (1998). The reasonableness of a search depends on a balancing of the need to search against the intrusion the search entails. *People v Wallin*, 172 Mich App 748, 750; 432 NW2d 427 (1988).

In the instant case, the trial court did not make any cogent findings of fact, and instead stated on the record its conclusion that the "knock and talk procedure" was "not a bad idea," but that, based on the time of the encounter, the "search was unlawful" because "[w]e don't do business that way." The court also seemed concerned that one other resident lived in the dwelling. We believe that the trial court erred in relying almost exclusively on the time of the "knock and talk" as a basis for its ruling, and therefore reverse.

As the *Frohriep* Court noted, many courts have indicated that there is ordinarily no coercive aspect to a "knock and talk" performed by police officers on private property. *Frohriep, supra* at 697-698; see also *United States v Cormier,* 220 F3d 1103, 1109 (CA 9, 2000), and cases cited therein. Police, like any other member of the public, are free to "walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant . . . ." *Davis v United States,* 327 F2d 301, 303 (CA 9, 1964).

Although they are free to approach a home and seek to question the occupant, as noted in *Frohriep*, courts must still determine whether, under Fourth Amendment principles, consent to the entry and any subsequent search was voluntary or whether there was an unlawful seizure of the individual because of coercive police conduct. *Frohriep, supra* at 699-703. In doing so, courts have considered the type and amount of knocking done by police, *United States v Jerez,* 108 F3d 684, 705 (CA 7, 1997) (Coffey, J., dissenting), whether there were police demands to open the door, *United States v Winsor,* 846 F2d 1569, 1573 n 3 (CA 9, 1988), and the time the

officers knocked on the door. *Aaron Scott v State,* 366 Md 121, 133-138; 782 A2d 862 (2001). However, as the Maryland Court of Appeals noted in *Aaron Scott*, no court has held that a "knock and talk" is coercive as a matter of law solely because of the time it takes place, and to do so would require implementation of a judicially created bright-line rule, which would be, by its very nature, unprincipled and unworkable. *Id.* at 138. Instead, the ultimate inquiry "is whether a reasonable person in the same circumstances would have felt free to decline the officers' request to search." *John Scott v State,* 347 Ark 767, 778; 67 SW3d 567 (2002).[1]

In the instant case, the trial court's ultimate conclusion that there was an unlawful seizure did not entail any findings of fact or conclusions of law relative to a Fourth Amendment analysis regarding the reasonableness of the police conduct and whether defendant consented to the police questioning and search. *Frohriep, supra.* Instead, the court seemed to rely almost exclusively on the time of the police encounter, which is a factor, but not an exclusive factor, used to determine the reasonableness of an encounter. On remand, the trial court should consider all of the pertinent factors in determining whether defendant consented to the search or whether the police acted in such a manner so as to constitute an unlawful seizure of defendant. Accordingly, we reverse the trial court's order suppressing the evidence and dismissing the charges, and remand to the trial court for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray

[1] This inquiry is stated slightly differently than the "not free to leave" standard set forth in *Shankle, supra,* in recognition of the fact that this encounter took place in defendant's residence, where he likely had no desire to leave. *John Scott, supra* at 777-778, relying on *Florida v Bostick,* 501 US 429; 111 S Ct 2382; 115 L Ed 2d 389 (1991) and *Michigan v Chesternut,* 486 US 567; 108 S Ct 1975; 100 L Ed 2d 565 (1988).